



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/675,671	09/29/2000	Yoshito Shibauch	4035-0116P	3850

7590

08/02/2004

Birch Stewart Kolasch & Birch LLP  
P O Box 747  
Falls Church, VA 22404-0747

EXAMINER
----------

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 08/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS  
UNITED STATES PATENT AND TRADEMARK OFFICE  
P.O. Box 1450  
ALEXANDRIA, VA 22313-1450  
www.uspto.gov

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Application Number: 09/675,671  
Filing Date: September 29, 2000  
Appellant(s): SHIBAUCH ET AL.

MAILED  
AUG 02 2004  
GROUP 1700

James M. Slattery  
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/10/2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

Appellant's brief includes a statement that claims 12-16 stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

**(8) *Claims Appealed***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) *Prior Art of Record***

5,928,692	MAYFIELD	7-1999
4,670,276	NAKAJIMA	6-1987

Art Unit: 1761

4,832,970

MALLY ET AL.

5-1989

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 12-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mayfield in view of Mally et al and Nakajima.

Mayfield discloses an edible food product having multilayer structure that is wrapped in an edible film. The food product contains a layer of one food item placed on a layer of a second food item; the foods items may be any desired items. The multilayer food product may be comprised of any desired food materials and may have any number of layers and any number of different edible materials. The food product is wrapped in an edible film which prevents the product from sticking with the storage medium in which it is placed. Instead of forming a film, the gelled edible film material

Art Unit: 1761

may be sprayed onto the food product. The individual slices of the food product having the edible film or layer thereon may be further wrapped together and packaged. (See columns 4-5)

Mayfield does not specifically disclose two external layers of platy material containing cheese and at least one intermediate layer which is cheese different or the same from the external layers.

Mally et al disclose platy food material containing cheese. (See the abstract)

Nakajima discloses platy food material containing cheese. (See the abstract)

Mayfield discloses the food product may be comprised on any desired food materials. Thus, it would have been obvious to one skilled in the art to use any combination of food material to form food products having an assortment of taste, flavor and texture. For example, it would have been obvious to combine the platy food materials of Mally et al and Nakajima with a cheese to produce food product having the taste of meat, fish and cheese. It would also have been obvious to combine different type of cheese such as cream cheese with cheddar cheese or mozzarella cheese to obtain a food product with different cheese flavor, taste and appearance. The combination is endless and depends on the taste, flavor, texture, look desired. Mayfield discloses the individual slices are packaged together and since the slice has an edible film to prevent sticking, it is obvious the slice is releasable from adjoining slice.

**(11) Response to Argument**

On page 10 of the appeal brief, appellant argues Mayfield teaches a food product that is wrapped with an edible film so that it is no longer sticky; thus, there can be no

suggestion that the layers 12,14 of one Mayfield food product are releasable from layers 12, 14 of another food product 10. This argument is not persuasive. Appellant only argues from one embodiment of the Mayfield teaching and ignores the other embodiment. While Mayfield teaches forming a film and wrapping the multiplayer food product in such film, he also discloses an alternative embodiment. Appellant's attention is directed to column 5 lines 10-15 where Mayfield discloses " instead of forming a film, the gelled edible material described earlier or any other suitable edible material in a liquid or gelled form may be sprayed as shown by numeral 24 on the food product 10". Thus, film material forms a part of layers 12, 14 and is present in layer 12, 14. Appellant's claims do not exclude the presence of additional material in the external layers. The purposes of the film coating are to prevent the product from sticking, allows for easy handling, serve as moisture barrier; thus, the presence of the coating gives the layers inherent releasability because the layers do not stick to other surface. If the coating are present on the layers and prevent sticking, the stacking of one multilayer food product with another multiplayer food product will also prevent sticking and allow for releasability because the other food product also contains the coating in the external layers. Furthermore, the claims do not exclude the presence of the film; the two external layers of the food product 10 are still layers 12, 14. The requirement that the food product is inherently releasable from external layers of adjoining ones is met by the inclusion of the film because such film prevents the food products from sticking. If two food products 10 are stacked together, they are easily releasable from each other because the film prevents the layers from sticking together.

On page 12 of the appeal brief, appellant argues the layers 12,14 in one food product 10 do not adjoin the layers 12, 14 of an another food product 10. This argument is not persuasive. When a film is not made and the film solution is sprayed onto the layers as shown in figure 1B, the film material forms part of the layers 12, 14. Thus, when one food product 10 is stacked with another food product 10, the layers 12, 14 will adjoin to the layers 12, 14 of another food product 10. Appellant further argues Mayfield fails to teach that the edible films contain cheese. It is recognized that the films do not contain cheese; however, the external layers can contain cheese as Mayfield discloses on column 4 lines 54-57 " food product 10 may be comprised of any desired food materials" and line 52 discloses cheese. The coating is part of the external layers. Appellant argues the external layers of Mayfield are edible film containing no cheese. The external layers of the food product disclosed in Mayfield can contain cheese as explained above. For example, the food product as shown in figure 1B contains external layers 12, 14; the coating 24 is not shown as separate layer, but as part of the external layers. The claims do not exclude additional material. Also, figure 1A shows external layers 12, 14 which can contain cheese. The food product is wrapped in film 20; the claims do not exclude the addition of the film. Appellant argues there is no external layer to external layer contact of layers containing cheese. The claims do not recite an external layer to external layer contact of layers containing cheese; the claims require only that the layers have inherent releasability. As shown above, the food products in Mayfield do have inherent releasability. There is no recitation of direct external layer to external layer contact. Also, when the food product

is not wrapped in the film, there will be contact between the external layers when two food products are placed on top of each other. On page 13 of the appeal brief, appellant argues the layers 12, 14 which may contain cheese are not releasable from each other. Even without the coating, appellant has not presented any evidence to show that the layers which may contain cheese are not releasable from each other. While slices of cheese have a moist surface, they are not tenaciously stick to each other in such a way that they cannot be released from each other. For instance, a commercially available package of cheese containing multiple slices can be easily separated. Appellant does not disclose in the specification that the cheese is treated so that it will have releasability. In fact, the term inherent releasability indicates that cheese by its nature is releasable.

With respect to the Mally et al and Nakajima references, appellant argues there is no suggestion in these references that the layers are releasable from each other. The Mally et al and Nakajima references are only relied upon to show examples of cheese containing platy food that can be used to make the food product disclosed in Mayfield. When such platy food is used to form the layers in the food product of Mayfield, the layers will have releasability because of the coating.

On page 15 of the appeal brief, appellant argues none of the references teaches or suggests a package formed by wrapping a multiplayer structure. This argument is not persuasive. Mayfield discloses on column 5 lines 2-5 "this method allows stacking of several individually wrapped product in a storage medium"; this disclosure clearly suggests that the individual multiplayer food product can be packaged together by





Art Unit: 1761

stacking. The selection of the type of packaging would have been an obvious matter of selection.

For the above reasons, it is believed that the rejections should be sustained.

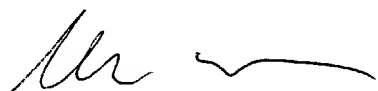
Respectfully submitted,


  
LIEN TRAN  
PRIMARY EXAMINER  


Lien Tran  
July 30, 2004

Conferees

Birch Stewart Kolasch & Birch LLP  
P O Box 747  
Falls Church, VA 22404-0747

  
Glenn Calderola  
Supervisory Patent Examiner  
Technology Center 1700

  
MILTON I. CANO  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700